83-1952

Office Supreme Court, U.S
FILED
JUN 30 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

PAN AMERICAN WORLD AIRWAYS, INC., APPELLANT,

v.

GEORGE FUCHERT, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

JAMES H. DANNENBERG
Deputy Attorney General
State of Hawaii
415 So. Beretania Street
Honolulu, HI 96813
Tel: (808) 548-4740
Counsel of Record

ROBYN M. MORIMOTO
Deputy Attorney General
Dept. of Labor and Industrial Relations
830 Punchbowl Street, Room 317
Honolulu, HI 96813
Tel: (808) 548-4372
Attorney for Appellee Agsalud

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION TO DISMISS OR AFFIRM	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL	5
I. THE COMPLAINT AGAINST APPELLANT ALLEGING UNLAWFUL DISCHARGE CANNOT BE CHARACTERIZED AS A MINOR DISPUTE SUBJECT TO THE COMPULSORY ARBITRATION UNDER THE RAILWAY LABOR ACT	6
A. A COMPLAINT GROUNDED IN A STATUTORY RIGHT IS NOT A MINOR DISPUTE	6
II. THE STATE COURT HAS JURISDICTION TO ENFORCE A PURELY STATUTORY CLAIM WHERE SUCH A CLAIM IS NOT A MINOR DISPUTE	20
CONCLUSION	24

TABLE OF AUTHORITIES

	Page
Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. 1980)	15, 19, 23
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1973)	8, 10, 11, 14, 15, 23
Andrews v. Louisville & N.R.R. 406 U.S. 320 (1972)	5, 6, 10
Andrews v. United States, 373 U.S. 334 (1963)	2
Barrentine v. Arkansas Best Freight System, 450 U.S. 728 (1980)	8, 11, 12, 14, 23
Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369 reh. denied 394 U.S. 1024 (1969)	9
Choate v. Louisville & N.R.R., 715 F.3d 369 (7th Cir. 1983)	16
Conrad v. Delta Airlines, Inc., 494 F.2d 914 (7th Cir. 1974)	20
Dorsey v. Chesapeake v. Ohio, R., 476 F.ed 243 (4th Cir. 1973)	18
Elgin, J. & E.R. v. Burley, 325 U.S. 711 (1944) affirmed 327 U.S. 661 (1946)	7, 8

Hendley v. Central of Georgia R.R., 609 F.2d 1146 cert. denied 449 U.S. 1093 (1981) 19

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983) 16

Jezierney v. Biggins, 56 Haw. 662, 548 P.2d 251 mtn. denied 57 Haw. 82, 549 P.2d 739 (19) 2

Kaschak v. Consolidated Rail Corp. 707 F.2d 902 (6th Cir. 1983) 17

Landfried v. Terminal R.R. Ass'n., 721 F.2d 254 (8th Cir. 1982) 19

McDonald v. City of West Branch, ___ U.S. ___, 104 S.Ct. 1799 (April 18, 1984) 8

Machinists v. Central Airlines 372 U.S. 682 (1963) 10

Magnuson v. Burlington Northern, Inc., 576 F.2d 1369 (9th Cir.) cert. denied 439 U.S. 930 (1978) 17

New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) 20, 21

Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) 21, 23

Perry Educatioan Ass'n v. Perry, Local Educators Ass'n, ___ U.S. ___, 103 S.Ct. 948 (1983) 2

Radar v. United Transportation Union, 718 F.2d 1012 (11th Cir. 1983) 17

Railroad Trainmen v. Toledo, P. & W.R. Co., 321 U.S. 50 (1944) 9

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 21

Schroeder v. Trans World Airlines, Inc., 702 F.2d 189 (9th Cir. 1983) 17

Slocum v. Delaware, L. & W.R.R. 339 U.S. 239 (1950) 23

Stanton v. Delta Airlines, Inc., 669 F.2d 833 (1st Cir. 1982) 17

Steele v. Louisville N.R., 323 U.S. 192 (1944) 9

United Steelworkers of America v. Enterprise Wheel, 363 U.S. 593 (1960) 15, 23

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

PAN AMERICAN WORLD AIRWAYS, INC., APPELLANT,

v.

GEORGE PUCHERT, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

Appellee Joshua C. Agsalud, Director of the Department of Labor and Industrial Relations, State of Hawaii, respectfully moves, pursuant to Supreme Court Rule 16, to dismiss or affirm the decision of the Hawaii Supreme Court.

JURISDICTION

Appellee disagrees with Appellant Pan American World Airways, Inc.'s assertion of jurisdiction pursuant to 28 U.S.C. § 1254(2) where the state statute

involved has not been struck down by a court of appeals as repugnant to the Constitution, treaties, or laws of the United States. Perry Education Association v. Perry Local Educators Association, ____ U.S. ____, 103 S. Ct. 948 (1983).

Moreover, the Supreme Court by statute only has jurisdiction over final judgments or decrees rendered by state courts. 28 U.S.C. § 1257 (1966) See Andrews v. United States, 373 U.S. 334, 340 (1963); 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3908 ( ). The Hawaii Supreme Court decision of January 27, 1984 remanded this case for a hearing on the merits; thus, said decision is not a final judgment. See Jezierny v. Biggins, 56 Haw. 662, 548 P.2d 251 mtn denied 57 Haw. 82, 549 P.2d 739 (19) Appellant has not alleged any circumstances which dictate against

the application of the final judgment rule in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The jurisdictional statement and accompanying appendix set forth the constitutional and statutory provision involved. They will not be repeated.

QUESTIONS PRESENTED

1. Whether a complaint against an airline alleging unlawful discharge based on a state statutory right not synonymous with any right under a collective-bargaining agreement constitutes a minor dispute subject to compulsory arbitration under the Railway Labor Act.

2. Whether the state court has jurisdiction to enforce a claim under a state statute regulating unlawful discharges where such claim is not a minor dispute.

STATEMENT OF THE CASE

Appellee basically agrees with the procedural history and statement of facts set forth in Appellant's jurisdictional statement, however, Appellee disagrees with Appellant's characterization of this case.

This case involves a state's right to provide a forum for its citizens in which they can enforce their statutory right not to be discharged solely because they have incurred an injury compensable under Hawaii's workers' compensation law. The statutory provision in this case is particularly non-intrunsive in the federal scheme under the Railway Labor Act to provide one forum for resolution of minor disputes, i.e., disputes arising under a collective bargaining agreement, because Hawaii's statute specifically provides that the statutory provision involved does not apply to any employer "who is a party to a

collective bargaining agreement which prèvents the continued employment or re-employment of the injured employee." Hawaii Revised Statutes (HRS) § 378-32(2) (1976).

QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The decision of the Hawaii Supreme Court rests upon the proposition that the claim involved did not constitute a minor dispute as it is grounded upon a state statutory right; a right not synonymous with any right provided under the then current collective-bargaining agreement between Appellant and the Transport Workers Union of America. See Andrews v. Louisville N.R.R., 406 U.S. 320, 324 (1972). Neither the Railway Labor Act nor case law mandate the conclusion that the Adjustment Board has exclusive jurisdiction over the claim in this case.

I. THE COMPLAINT AGAINST APPELLANT ALLEGING UNLAWFUL DISCHARGE CANNOT BE CHARACTERIZED AS A MINOR DISPUTE SUBJECT TO COMPULSORY ARBITRATION UNDER THE RAILWAY LABOR ACT.

Appellant has in its jurisdictional statement outlined the legislative and precedential history of the Railway Labor Act, which compelled the conclusion reached by this Court that submittal of disputes to the Adjustment Board is compulsory rather than optional where petitioner's only source of right was "conceded by all" to spring from "the collective-bargaining agreement between the employer and the union." Andrews, 406 U.S. at 324.

Appellee does not seek to challenge the validity of Andrews; rather Appellee seeks to demonstrate that the holding in Andrews is not applicable in this case.

A. A COMPLAINT GROUNDED IN A STATUTORY RIGHT IS NOT A MINOR DISPUTE

The basic disagreement between Appellant and Appellee revolves around

whether the claim in this case constitutes a minor dispute.

Appellant points to the expansive language in Elgin, J. & E.R. v. Burley, 325 U.S. 711 (1945) for the proposition that minor disputes consist of any dispute arising out of the union-represented employee employer relationship "even if such matters are not covered by the agreements." Appellant's Jursidictional Statement at 14. Appellant's averment appears necessary for its case since the collective bargaining agreement is silent on the issue of discharge solely because an employee suffered a work injury cognizable under the state's workers' compensation law. See appendix to Appellant's jurisdictional statement, Exhibit A-76.

Appellee disagrees with Appellant's contention for two reasons. First, while

the language in Elgin is admittedly broad, the dispute in the case revolved around a specific provision of the agreement: "Both collective and individual interests may be concerned in settlement where, as in this case, the dispute concerns all members alike, and settlement hangs exclusively upon a single common issue or cause of dispute arising from the terms of a collective agreement." Elgin, 325 U.S. at 737 (emphasis added). Second, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and subsequent cases have acknowledged a distinction between a contractual claim and a statutory claim. MacDonald v. City of West Branch, ___ U.S. ____, 104 SCt. 1799 (April 18, 1984); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981).

Appellant objects to the use of National Labor Relations Act cases in this

case dealing with the Railway Labor Act; however, while this Court has warned against wholesale importation of the provisions of the NLRA into the Railway Labor Act, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 reh. denied 394 US 1024 (1969), "The Court has in the past referred the NLRA for assistance in construing the Railway Labor Act, see, e.g. Steele v. Louisville & N.R. Co., 323 US 192, 200-201, 81 LEd 173, 181, 182, 65 SCt 226 (1944); Railroad Trainmen v. Toledo, P. & W.R. Co., 321 US 50, 61, n. 18, 88 LEd 534, 541, 64 SCt 413, 150 ALR 810 (1944)." 394 U.S. at 383. This is particularly true when the general principles to be considered are capable of consistent application.

In this case, where the issue turns upon the distinction between contractual and statutory rights, it seems especially

appropriate to look to NLRA precedent to aid in the determination of what type of rights a collective bargaining agreement would encompass. "(A)n agreement required under sec. 204 of the Railway Labor Act was said to be 'like the Labor Management Relations Act sec. 301 contract ... a federal contract and ... governed and enforceable by federal law, in federal courts.'" Andrews v. Louisville & N.R.R., 406 U.S. at 323 quoting Machinists v. Central Airlines, 372 U.S. 682, 692 (1963).

In Gardner-Denver, this Court declared that statutory rights afforded individuals pursuant to Tile VII are separate and distinct from contractual rights afforded union members under their collective-bargaining agreement.

The distinctly separate nature of the rights is not vitiated "merely because both [are] violated as a result of the same

factual occurrence." Gardner-Denver, 415 U.S. at 49-50.

The decision was based on the finding that "in enacting Title VII, Congress had granted individual employees a non-waivable, public law right to equal employment opportunities that was separate and distinct from the rights created through the 'mojoitarian process' of collective bargaining." Barrentine, 450 U.S. at 737-38, quoting Gardner-Denver, 415 U.S. at 51. Moreover, the Gardner-Denver Court found that the contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights since the arbitrator's task is to "interpret and apply [the collective-bargaining] agreement in accordance with the 'industrial common law of shop' and the various needs and desires of the parties," and he "has no general authority to invoke

public laws that conflict with the bargain between the parties." Id. at 53.

Similarly, the Barrentine Court acknowledged a distinction between wage claim actions pursuant to a collective bargaining agreement and pursuant to the minimum wage provisions of the Fair Labor Standards Act, noting that "While courts should defer to arbitral decisions where the employee's claim is based on rights arising out of the collective bargaining agreements, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." 450 US at 737.

In this case, the State in enacting the statute involved was interested in providing individuals protection against discharges in this specific situation. The employment rights of employees in the State

of Hawaii first became a legislative concern in 1963. Hawaii's reformed workers' compensation Act included a provision designed as HRS § 97-135 which made it unlawful to discharge an employee solely because he incurred a work injury compensable under the Act, unless the employee was no longer capable of performing available jobs. Hawaii Revised Statute § 97-135 was later redesignated as HRS § 386-141 and administered by the workers' compensation division. Subsequently, concerned with effective enforcement against unlawful employment practices, the legislature repealed HRS § 386-141, enacted HRS § 378-32 the current statutory provision, and transferred the enforcement function to the Division of Labor Law Enforcement, Department of Labor, State of Hawaii whose primary function is investigation of labor law violations.

It is clear from the history of Hawaii's statute that the state was and is concerned with insuring that its citizens' rights to workers' compensation benefits are not frustrated. In furtherance of this objective the state, after some experimentation, has located the agency best suited for enforcing this statutory provision and entrusted the agency with such authority.

Appellant has not pointed to any provision in the collective bargaining agreement which would afford the individual the same right secured by statute. Thus, the argument that the contractual and statutory rights involved here are separate and distinct is stronger here than in Gardner-Denver and Barrentine, where the collective agreements did at least to a limited extent provide the employees

protection similar to that provided by statute.

Moreover, since the agreement doesn't contain any provisions as to the impropriety of discharging an employee solely because he has a compensable workers' compensation claim, it is unlikely that the Adjustment Board as arbitrator would have authority to resolve the claim. See United Steelworkers of America v. Enterprise Wheel, 363 U.S. 593 (1960); Gardner-Denver, supra; Air Line Pilots Association v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. 1980).

Appellant has not suggested that the Adjustment Board's arbitral powers are any greater than those of arbitrators in general.

Thus, the purely statutory right, a claim not recognized by the collective-bargaining agreement, cannot be

characterized as a minor dispute, for to do so would be to require its submissal to a Board that has no authority to enforce the claim.

The lower federal court cases cited by Appellant do not indicate a trend to interpret Andrews to apply to purely statutory causes of action. None of the cases concluded that purely statutory rights must be submitted to the Adjustment Board. The claims in the following cases were based either on contract or common law: Jackson v. Consolidated Rail Corp., 717 F.2d 1045, 1049 (7th Cir) (Claimant's "right not to be discharged at will of conrail grows out of collective bargaining agreement."); Choate v. Louisville & N.R.R.. 715 F.2d 369, 371 (7th Cir 1983) (Characterizing defendant's conduct as improper "implies the existence of

contractual standards."); Schroeder v. Trans World Airlines, Inc., 702 F.2d 189 (9th Cir 1983) (involved interpretation of seniority rights provision in contract); Radar v. United Transportation Lines, 718 F.2d 1012, 1013 (11th Cir 1983) (interpretation of "collective bargaining agreement regarding seniority rights"); Stanton v. Delta Airlines, Inc., 669 F.2d 833, 837 (1st Cir 1981) subject matter of grievance involved "the meaning of terms in the contract"); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 cert. denied 439 U.S. 930 (9th Cir 1978) (only claim asserted was common law tort of emotional distress).

Additionally, Kaschak v. Consolidated Rail Corp., 707 F.2d 902 (6th Cir 1983), the Court decided not to foreclose resort to the courts to a claimant if upon remand the claimant could

show that he reasonably relied upon his union to advance his claim through the grievance procedures of the union breached its duty.

The court's decision in Dorsey v. Chesapeake & Ohio Railway, 476 F.2d 243, did not rest on a determination, as asserted by Appellant, that even Constitutional claim must also be referred to the Adjustment Board. Rather, the court in Dorsey noting that the constitutional violations asserted by the claimant occurred during the initial hearing by the employer on railroad property, stated "The federal courts are not guarrantors of any rights of either labor or management at the initial hearing either by force of the constitution or Railway Labor Act."

Thus, all that the above cases demonstrate is that where a claimant is unable to assert a right other than one

involving the interpretation of the collective-bargaining contract or resting on a common law tort, the dispute is minor and should be submitted to the Adjustment Board.

In contrast, the court in Landfried v. Termal RR Association, 721 F.2d 254, 256 (8th Cir 1982), stated that its decision in favor of the Board's jurisdiction may have been different if "plaintiff could show that their discharge constitutes the violation of a specific federal statutory section." See Hendley v. Central of Georgia Railroad, 609 F.2d 1146 cert. denied 449 US 1093 (1981) (5th Cir 1980).

Similarly, the court in Air Line Pilots Association, supra, stated that "The Railway Labor Act's arbitral provisions do not demand that such pure statutory, non-contractual claims be sent to arbitration, they can go directly to

court." 627 F.2d at 277. See Conrad v. Delta Air Lines, Inc., 494 F.2d 914 (7th Cir 1974) (Charge based on violation of provision of the Railway Act not committed to exclusive jurisdiction but is within jurisdiction of district court).

Thus, there is no developing body of case law supporting Appellant's position, rather the opposite.

II. THE STATE COURT HAS JURISDICTION TO ENFORCE A PURELY STATUTORY CLAIM WHERE SUCH A CLAIM IS NOT A MINOR DISPUTE.

The doctrine of labor law pre-emption concerns the extent to which Congress has placed implicit limits on the permissible scope of state regulation of activity touching upon labor management relations. New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 527 (1979).

With respect to laws deeply rooted in local feeling and responsibility, this

Court has stated, "that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." New York Telephone, 440 U.S. at 539-40 quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

"Workmen's compensation is pre-eminently a matter of state concern. Cf. New York Telephone Co., supra, 440 U.S. at 533-39, 99 S.Ct. at 1337-1340, (state unemployment compensation statutes should be treated with the same deference afforded other state laws protecting interests deeply rooted in local feeling and responsibilty.)" Peabody Galion v. Dollar, 666 F.2d 1309 (9th Cir. 1981).

In this case, it appears that Appellant is not attacking the state's power to enact a statute making it unlawful to discharge an employee solely because he

has a compensable injury but rather challenging the state's power to afford the employee a forum in which such right could be enforced.

Appellee contends that in this case there is no "compelling congressional direction" from which it can be inferred that Congress deprived the State of the power to act.

Resort to the Adjustment Board for minor disputes was thought to be both effective and desirable because the Board was "well equipped to exercise its congressionally imposed functions. Its members understood railroad problems and speak the railroad jargon. Long varied experiences have added to the Board's initial qualifications. Precedents established by it while not necessarily binding, provide opportunities for a desirable degree of uniformity in the

interpretation of agreements throughout the nation's railway systems." Slocum v. Delaware, L. & W.R.R., 339 U.S. 239, 243 (1950).

The attributes which recommend the Board as an ideal forum for disposing of disputes which arise under collective bargaining agreements do not compel the same conclusion where the dispute arises from a statutory right which is not recognized by the collective-bargaining agreement. See Gardner-Denver, 415 U.S. at 53; Barrentine, 450 U.S. at 737. "It is fundamental that an individual cannot be compelled to arbitrate a dispute which he did not contract to arbitrate." Peabody, 666 F.2d at 1320. United Steelworkers of America v. Enterprise Wheel, supra, Air Line Pilots Association v. Northwest Airlines, 627 F.2d at 277.

Consequently, it is inconceivable to imply a congressional intent to require that a purely statutory claim, resulting from legislation deeply rooted in local concern be addressed and resolved by an Adjustment Board which is not equipped to consider such claim where the collective bargaining agreement is silent on the subject.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends are so unsubstantial as to not need further argument.

Respectfully submitted,

JAMES H. DANNENBERG
Deputy Attorney General
Attorney for Appellee Joshua C. Agsalud, Director of the Department of Labor and Industrial Relations, State of Hawaii